Ian Chin Hon Chong (for himself and on behalf of all the affected judges who were appointed to the High Court in Sabah and Sarawak before 1 July 2015 and receiving their pensions and on behalf of all persons who are receiving their derivative pensions on account of the death of such judges) v The Government of Malaysia & Anor

HIGH COURT (KOTA KINABALU) — ORIGINATING SUMMONS NO BKI-24NCvC-17/2 OF 2022
LEONARD SHIM J
9 DECEMBER 2022

Constitutional Law — Judges — Remuneration — Pension — Defendants failed to pay monthly pension to plaintiff in accordance with formula — Plaintiff contended defendants passed Judges' Remuneration (Amendment) Act 2014 which altered to plaintiff's disadvantage pension payable to plaintiff — Whether adjustment of pension was within ambit of pension rights and protected by art 125(7) of Federal Constitution — Whether pension rights of plaintiff had been altered to their disadvantage — Federal Constitution art 125(7) & (9)

This was an action by the plaintiff for, inter alia, declarations that: (a) the defendants had violated and continued to violate art 125(7) read with art 125(9) of the Federal Constitution ('FC') when they failed to pay the monthly pension to the plaintiff in accordance with the formula of '1/360 x 201 months x current salary of a judge but not more than 3/5 of that salary'; and (b) the Judges' Remuneration (Amendment) Act 2014 ('Act A1462') was void for being inconsistent with art 125(7) read with art 125(9) of the FC. The plaintiff retired as a judge of The High Court after serving for 16 years and nine months entitling him to a full pension under the then existing law. He was also suing on behalf of all the retired judges of the High Court of Sabah and Sarawak who were appointed judges before 1 July 2015 and receiving their pensions and on behalf of all persons who were receiving their derivative pensions under the Judges' Remuneration Act 1971 ('Act 45') and who were not otherwise parties in any similar action in the High Court of Malaya. The plaintiff contended that the defendants caused to be passed Act A1462 which altered to the plaintiff's disadvantage the pension payable to the plaintiff. Act A1462 abolished the previous formula for computation of the pension based on the current salary of a judge and instead allowed a flat rate increase of 2%. As a result, even though the judge's salary was increased to RM26,500 under the Judges' Remuneration (Amendment of First and Fifth Schedules) Regulations 2016 ('PU(A) 59/2016') with effect from 1 July 2015, the pension was not adjusted according to that new salary. The defendants contended that: (i) pension

adjustment was an 'additional benefit' which was not in the nature of a 'pension right' envisaged under art 125(7) of the FC; (ii) the salary revision vide PU(A) 59/2016 was not intended to apply to judges who had retired before the coming into effect of the said salary revision on 1 July 2015; and (iii) if pension adjustment was considered as a 'pension right' and Act A1462 was declared as null and void, the salary revision vide PU(A) 59/2016 which depended on the validity of Act A1462 should likewise be nullified.

Held, allowing encl 1:

(1) The judges had a vested right to pension under s 3 of Act 45 and it was protected by art 125(7) of the FC. The remuneration, terms of office and pension rights were set out explicitly in Act 45 including the pension benefits set out in the Third and the Fourth Schedules which a judge was entitled on his retirement. Pension adjustment must be done in accordance with the Third and Fourth Schedules when there was an upward revision of the salary of a judge. This was part of the 'pension rights' which art 125(7) of the FC spoke of and protected. Therefore, there was no merit in the contention of the defendants that because 'pension adjustment is a form of additional benefit' it was 'not a vested right' when the Judges' Remuneration (Amendment) Act 1984 ('Act A609') was introduced and not protected by art 125(7) of the FC which the defendants contended was supported by debate note for Act A609. Once Act A609 was passed it conferred on the judges all the benefits including pension rights stated therein and it triggered in the protection of art 125(7) of the FC. Further, the debate notes had no place in the interpretation of Act A609 which relevant provisions referred to earlier were clear and unambiguous (see paras 52 & 56–58).

(2) By using the parity principle to justify the new formula for the pension adjustment of judges at the rate of 2% annually to be in line with the civil servants, the defendants had failed to appreciate the significant differences in the salary structure, status and role played by the judges. The salary of the Chief Justice, President of the Court of Appeal, Chief Judges and Federal Court and Court of Appeal judges and High Court judges was based on a single point salary without any annual increment or bonus as enjoyed by employees in the civil service or the private sector. It was unfair and inconsistent with art 125(7) of the FC to alter the pension rights of judges or retired judges to their disadvantage by applying the parity principle (see paras 62–63).

(3) The salary revision regulation PU(A) 59/2016 was not dependent on the validity or otherwise of Act A1462. It was a standalone regulation. Furthermore, PU(A) 59/2016 provided for an increase in the salary of judges which had been stagnant for six years and the increase was to their advantage. As there was no disadvantageous alteration to the salary of

judges by PU(A) 59/2016, the said PU(A) 59/2016 was not inconsistent with art 125(7) of the FC and was lawful and valid. Thus, the defendant's contention that in the event that Act A1462 was nullified, then PU(A) 59/2016 should also be nullified and the consequential prayer by the defendants for reversion to the pre PU(A) 59/2016 salary was without merit. The new formula turned out to be far lesser than the rate of increment under the old formula. Thus, there was no evidence of unjust enrichment or gain at the defendants' expense on the part of the plaintiff and those whom he represented to warrant an order for refund or restitution (see paras 68 & 71).

[Bahasa Malaysia summary

Ini adalah tindakan plaintif untuk, antara lain, pengisytiharan bahawa: (a) defendan telah melanggar dan berterusan melanggar perkara 125(7) dibaca bersama perkara 125(9) Perlembagaan Persekutuan ('PP') apabila mereka gagal membayar pencen bulanan kepada plaintif mengikut formula '1/360 x 201 bulan x gaji semasa hakim tetapi tidak melebihi 3/5 daripada gaji tersebut'; dan (b) Akta Saraan Hakim (Pindaan) 2014 ('Akta A1462') adalah terbatal kerana tidak konsisten dengan perkara 125(7) dibaca bersama perkara 125(9) PP. Plaintif bersara sebagai hakim Mahkamah Tinggi selepas berkhidmat selama 16 tahun dan sembilan bulan yang melayakkannya mendapat pencen penuh di bawah undang-undang sedia ada. Beliau juga menyaman bagi pihak semua hakim Mahkamah Tinggi Sabah dan Sarawak yang telah bersara yang dilantik sebagai hakim sebelum 1 Julai 2015 dan menerima pencen dan bagi pihak semua orang yang menerima pencen terbitan mereka di bawah Akta Saraan Hakim 1971 ('Akta 45') dan yang bukan pihak lain dalam mana-mana tindakan serupa di Mahkamah Tinggi Malaya. Plaintif berhujah bahawa defendan menyebabkan diluluskan Akta A1462 yang mengubah kepada kerugian plaintif terhadap pencen yang perlu dibayar kepada plaintif. Akta A1462 memansuhkan formula pengiraan pencen sebelum ini berdasarkan gaji semasa hakim dan sebaliknya membenarkan kenaikan kadar rata sebanyak 2%. Akibatnya, walaupun gaji hakim dinaikkan kepada RM26,500 di bawah Peraturan-Peraturan Saraan Hakim (Pindaan Jadual Pertama dan Kelima) 2016 ('PU(A) 59/2016') berkuat kuasa 1 Julai 2015, pencen itu tidak diselaraskan mengikut gaji baru itu. Defendan berhujah bahawa: (i) pelarasan pencen adalah 'manfaat tambahan' yang tidak berbentuk 'hak pencen' yang dibayangkan di bawah perkara 125(7) PP; (ii) semakan gaji menurut PU(A) 59/2016 tidak bertujuan untuk digunakan kepada hakim yang telah bersara sebelum berkuatkuasanya semakan gaji tersebut pada 1 Julai 2015; dan (iii) jika pelarasan pencen dianggap sebagai 'hak pencen' dan Akta A1462 telah diisytiharkan sebagai terbatal dan tidak sah, semakan gaji menurut PU(A) 59/2016 yang bergantung kepada kesahihan Akta A1462 hendaklah juga terbatal.

Diputuskan, membenarkan lampiran 1:

(1) Hakim mempunyai hak terhadap pencen di bawah s 3 Akta 45 dan ia dilindungi oleh perkara 125(7) PP. Ganjaran, terma jawatan dan hak pencen telah dinyatakan secara jelas dalam Akta 45 termasuk faedah pencen yang dinyatakan dalam Jadual Ketiga dan Keempat yang seorang hakim berhak kepada apabila bersara. Pelarasan pencen mesti dilakukan mengikut Jadual Ketiga dan Keempat apabila berlaku semakan ke atas gaji hakim. Ini adalah sebahagian daripada 'hak pencen' yang diperkatakan dan dilindungi oleh perkara 125(7) PP. Oleh itu, tiada merit dalam pertikaian defendan bahawa oleh kerana 'pelarasan pencen adalah satu bentuk faedah tambahan' ia adalah 'bukan hak' apabila Akta Saraan Hakim (Pindaan) 1984 ('Akta A609') diperkenalkan dan tidak dilindungi oleh perkara 125(7) PP yang dipertikaikan oleh defendan disokong oleh nota perbahasan untuk Akta A609. Sebaik sahaja Akta A609 diluluskan, ia memberikan kepada hakim semua faedah termasuk hak pencen yang dinyatakan di dalamnya dan ia mencetuskan perlindungan perkara 125(7) PP. Selanjutnya, nota perbahasan tidak mempunyai tempat dalam tafsiran Akta A609 yang mana peruntukan berkaitan yang dirujuk sebelum ini adalah jelas dan nyata (lihat perenggan 52 & 56–58).

(2) Dengan menggunakan prinsip pariti untuk mewajarkan formula baharu pelarasan pencen hakim pada kadar 2% setiap tahun supaya selaras dengan penjawat awam, defendan gagal memahami perbezaan ketara dalam struktur gaji, status dan peranan yang dimainkan oleh hakim. Gaji Ketua Hakim Negara, Presiden Mahkamah Rayuan, Hakim Besar dan hakim Mahkamah Persekutuan dan Mahkamah Rayuan dan hakim Mahkamah Tinggi adalah berdasarkan gaji satu mata tanpa sebarang kenaikan tahunan atau bonus seperti yang dinikmati oleh pekerja dalam perkhidmatan awam atau sektor swasta. Adalah tidak adil dan tidak konsisten dengan perkara 125(7) PP untuk mengubah hak pencen hakim atau hakim bersara kepada merugikan mereka dengan menggunakan prinsip pariti (lihat perenggan 62 & 63).

(3) Peraturan semakan gaji PU(A) 59/2016 tidak bergantung kepada kesahihan atau sebaliknya Akta A1462. Ia adalah peraturan yang berdiri sendiri. Tambahan pula, PU(A) 59/2016 memperuntukkan kenaikan gaji hakim yang terbantut selama enam tahun dan kenaikan itu menguntungkan mereka. Oleh kerana tiada pindaan yang merugikan kepada gaji hakim oleh PU(A) 59/2016, PU(A) 59/2016 tersebut tidak bercanggah dengan perkara 125(7) PP dan adalah berdasarkan undang-undang dan sah. Oleh itu, dakwaan defendan bahawa sekiranya Akta A1462 terbatal, maka PU(A) 59/2016 juga harus terbatal dan permohonan berbangkit oleh defendan untuk mengembalikan gaji sebelum PU(A) 59/2016 adalah tanpa merit. Formula baharu ternyata jauh lebih rendah daripada kadar kenaikan di bawah formula lama. Oleh itu, tiada bukti pengayaan atau keuntungan yang tidak adil atas

perbelanjaan defendan di pihak plaintif dan mereka yang diwakilinya untuk menjamin perintah untuk bayaran balik atau pengembalian (lihat perenggan 68 & 71).]

Cases referred to

Aminah bt Ahmad (suing in her personal capacity and on behalf of 56 retired members of the public services) v The Government of Malaysia & Anor [2022] 4 MLJ 74; [2022] 1 LNS 24, CA (refd)

CCH & Anor (on behalf of themselves and as litigation representatives of one CYM, a child) v Pendaftar Besar bagi Kelahiran dan Kematian, Malaysia [2022] 1 MLJ 71, FC (refd)

Dato Menteri Othman bin Baginda & Anor v Dato Ombi Syed Alwi bin Syed Idrus [1981] 1 MLJ 29, FC (folld)

Dream Property Sdn Bhd v Atlas Housing Sdn Bhd [2015] 2 MLJ 441; [2015] 2 CLJ 453, FC (refd)

Green v The Queen [2011] HCA 49 (refd)

Haji Wan Othman & Ors v Government of the Federation of Malaya [1965] 2 MLJ 31; [1965] 1 LNS 51 (refd)

Maria Chin Abdullah v Ketua Pengarah Imigresen & Anor [2021] 1 MLJ 750, FC (refd)

Raja Mohktar bin Raja Yaacob v Public Trustee, Malaysia [1970] 2 MLJ 151 (refd)

R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145; [1997] 1 CLJ 147, FC (refd)

Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island; Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island R v Campbell; R v Ekmecic; R v Wickman Manitoba Provincial Judges Assn v Manitoba (Minister of Justice) [1997] 3 SCR 3, SC (refd)

Legislation referred to

Federal Constitution arts 4(1), 125(7), (9), 147, 147(1)

Judges' Remuneration Act 1971 ss 1A, 15B, 15B(1), Part IIIA, Third Schedule, Fourth Schedule

Judicial Appointments Commission Act 2009 s 2

Pensions Act 1980 ss 3, 4, 14

Pensions Adjustment Act 1980

Pensions Ordinance 1951 (repealed by Pensions Act) ss 3, 5, 11

Remuneration Tribunal Act 1973 [AU]

Ian Chin (with Arthur Chin) (Arthur Chin & Assoc) for the plaintiffs.

Shamsul bin Bolhassan (Liew Horng Bin and Kogilambigai Muthusamy) (Federal Counsel, Attorney General's Chambers) for the defendant.

Leonard Shim J:

INTRODUCTION

[1] This is an action by the plaintiff for, inter alia, a declaration that the defendants have violated and continued to violate art 125(7) read with art 125(9) of the Federal Constitution when they failed to pay the monthly pension to the plaintiff in accordance with the formula of '1/360 x 201 months x current salary of a Judge but not more than 3/5 of that salary' and a declaration that the 'Judges' Remuneration (Amendment) Act 2014 ('Act A1462') is void for being inconsistent with art 125(7) read with art 125(9) of the Federal Constitution'.

[2] The main ground relied upon by the plaintiff is that the Judges' Remuneration (Amendment) Act 2014 (Act A1462) is void for being inconsistent with art 125(7) (read with art 125(9) of the Federal Constitution).

UNDISPUTED FACTS

[3] The plaintiff Ian Chin Hon Chong is suing on his own behalf.

[4] He also suing on behalf of all the retired judges of the High Court of Sabah and Sarawak who were appointed judges before 1 July 2015 and receiving their pensions and on behalf of all persons who are receiving their derivative pensions under the Judges' Remuneration Act 1971 (Act 45) and who are not otherwise parties in any similar action in the High Court in Malaya.

[5] The plaintiff Ian Chin Hon Chong ('the plaintiff') was appointed a judicial commissioner on 1 March 1992 and a judge of the High Court on 20 August 1993. He retired on 1 December 2008 after serving 201 months (that is 16 years and nine months) entitling him to a full pension under the then existing law.

[6] (a) by 1 June 2012 the plaintiff's pension was under the then existing law computed at the rate of '1/360 of his last drawn salary in respect of each completed month's service as a judge: Provided that in no case shall the pension so computed be more than 3/5 of his last drawn salary but without prejudice, however, to any adjustment of pension to his advantage that may be in accordance with Part IIIA' (the old formula);

(b) the then existing Part IIIA, s 15B(1) provides for an adjustment upward based on the 'corresponding last drawn salary'; and

(c) the term 'corresponding last drawn salary' is defined to mean 'in the case of a Judge to whom any of the current salaries does not apply by virtue of his having retired or died prior to the implementation and had the appropriate current salary been applied to his case;' (see s 1A, Judges' Remuneration Act 1971 (Act 45)).

[7] The plaintiff's pension had hitherto 1 July 2015 always been computed in the manner described in para 6 based on the upward changing salary scale of serving judges. The old s 15B of Act 45 provides as follows:

> 15B(1) Subject to Part III and this Part, pensions and other benefits granted to Judges and their dependants under that Part before or on the implementation of any current salary shall be adjusted in accordance with this Act and shall be paid or be payable with effect from the date of implementation of the current salary.
>
> (2) The pension of a Judge granted under Part III shall be adjusted as provided in the Third Schedule.
>
> (3) Any derivative pension granted under Part III shall be adjusted as provided in the Fourth Schedule.
>
> (4) Any disability pension or dependant's pension granted under Part III shall be adjusted based on the Judge's corresponding last drawn salary but the factor applicable shall be the factor under that Part.
>
> (5) In the event of any doubt in the determination of the corresponding last drawn salary of —
>
> (a) a Judge of a High Court;
>
> (b) a Judge of the Federal Court or of the Court of Appeal or a President or a Chief Judge; or
>
> (c) a Chief Justice,
>
> the corresponding last drawn salary in each case shall be determined respectively by —
>
> (i) the Chief Judge of the High Court concerned;
>
> (ii) the Chief Justice; or
>
> (iii) the Yang di-Pertuan Agong.

The old Third Schedule and Fourth Schedule of Act 45 provides:

A

THIRD SCHEDULE

[Subsection 15B(2)]

ADJUSTMENT FORMULA FOR PENSION OF JUDGE

B

Type of Benefit	*Formula*
Person of a Judge	1/360 x number of months of service (subject to not more than 216 months) corresponding last drawn salary; but the amount of pension, as adjusted, which is paid or payable in the case of a Judge who retires under section 8*(d)* or under section 8A shall not be less than 1/5 of the Judge's corresponding last drawn salary.

C

D

E

FOURTH SCHEDULE

[Subsection 15B(3)]

ADJUSTMENT FORMULA FOR DERIVATIVE PENSION OF DEPENDANT

F

Type of Benefit	*Formula*
Derivative pension shall be paid or be payable for life—	
(a) from the date immediately following the date of death in service of the Judge on or after 1st July 1980; or	1/360 x number of months of service (subject to not more than 216 months) x corresponding last drawn salary; but the amount of derivative pension, as adjusted, which is paid or payable on the death of the Judge in service or in retirement under paragraph 8*(d)* or under section 8A shall not be less than 1/5 of the Judge's corresponding last drawn salary.
(b) from the date immediately following the date of death of the Judge in retirement on or after 1 July	

G

H

I

The new s 15B of Act 45 provides:

15B(1) Subject to Part III and this Part, pensions and other benefits granted to Judges and their dependants under this Act shall be adjusted annually by an increment of two percent in accordance with the provisions of this Act and shall be paid or be payable with effect from January of each year.

(2) Notwithstanding subsection (1), where the application of the specified rate of increment would result in a situation that is less favourable to a Judge appointed before the coming into operation of this section, the Yang di-Pertuan Agong may, by order in the Gazette, prescribe an appropriate higher percentage to be applied in such case.

(3) For the purpose of an order under subsection (2), the Yang di-Pertuan Agong may prescribe —

(a) different percentages of increment for different categories of recipients; and

(b) that the higher percentage of increment shall only apply for a specified year or any part thereof, and in such case, the date on which the adjustment shall be payable.

(4) Any derivative pension granted under Part III shall be adjusted in accordance with subsection (1).

(5) Any disability pension or dependant's pension granted under Part III shall be adjusted in accordance with subsection (1) but the factor applicable shall be the factor applicable under that Part.

(6) Where the factor referred to in subsection (5) changes according to the eligibility of the dependant as specified under that Part, the dependant's pension shall be adjusted based on the notional salary as determined under subsection (7) using the new factor applicable under that Part.

(7) The notional salary —

(a) in the case of a dependant who received the dependant's pension before or on 1 January 2014, shall be the amount of the corresponding last drawn salary received by a Judge on 1 January 2014 which has been calculated with an increment of two percent annually up to the year when the factor changes; or

(b) in the case of a dependant who received the dependant's pension on or after 2 January 2014, shall be the amount of the last drawn salary received by a Judge on the date of his death which has been calculated with an increment of two percent annually up to the year when the factor changes.

(8) Where a higher percentage of increment has been prescribed under subsection (2), the increment specified under subsections (3), (4) and (5) shall be calculated using that prescribed higher percentage.

(9) The amount of dependant's pension adjusted under subsection (6) shall be used as the basis for adjustments under subsection (5) in subsequent years.

(10) For the purpose of this section, 'corresponding last drawn salary' means the corresponding last drawn salary which had been adjusted on 1 January 2014 pursuant to this Act before the coming into operation of this section.

[8] This plaintiff pension rights of the plaintiff is protected by art 125(7) (read with art 125(9) of the Federal Constitution) which states;

125(7) The remuneration and other terms of office (including pension rights) of a judge of the Federal Court shall not be altered to his disadvantage after his appointment.

(Article 125(7) was extended by art 125(9) to include High Court judges.)

[9] The plaintiff contends that the defendants caused to be passed the Judges' Remuneration (Amendment) Act 2014 (Act 1462) which altered to the plaintiff's disadvantage the pension payable to the plaintiff as illustrated and elaborated in the following TABLE 1 & TABLE 2 of encl 2. Table 1 is set out below as follows:

TABLE 1

Table illustrating the disadvantages suffered by the plaintiff since 1 July 2015 as a result of the violation by the defendants of article 125(7) with 125(9)) of the Constitution of Malaysia					
1st Column	2nd Column	3rd Column	4th Column	5th Column	6th Column
Year	Monthly Pension with 2% Increase	Monthly Increase	Monthly Pension Should Be	Monthly Dis-Advantage (Short-Paid)	Monthly Dis-Advantage (Short-Paid)
2015 (from July)	10,313.55	202.23	14,795.83	4,482.28	26,893.68
2016	10,519.82	206.30	14,795.83	4,276.01	51,312.12
2017	10,730.21	210.39	14,795.83	4,065.62	48,787.44
2018	10,944.81	214.60	14,795.83	3,851.02	46,212.24
2019	11,163.70	218.89	14,795.83	3,632.13	43,585.56
2020	11,386.97	223.27	14,795.83	3,408.86	40,906.32
2021	11,614.70	227.74	14,795.83	3,181.13	38,173.56
2022 (up to Feb)	11,846.99	232.29	14,795.83	2,948.84	5,897.68
Total amount the plaintiff was disadvantaged (short-paid) by the defendants (from July 2015 – Feb 2022)				RM 301,768.60	

[10] The computation and the amount that the plaintiff was disadvantaged as set out in Table 1 is not disputed by the defendant. The Judges' Remuneration (Amendment) Act 2014 (Act 1462) abolished the previous formula for computation of the pension based on the current salary of a judge and instead allow a flat rate increase of 2%. As a result, even though the Judge's salary was increased to RM26,500 under the Judges' Remuneration (Amendment of First and Fifth Schedules) Regulations 2016 (P(A) 59/2016) with effect from 1 July 2015, the pension was not adjusted according to that new salary.

[11] By 1 June 2012 the plaintiff's pension was under the law computed at the rate 1/360 of a judge prevailing salary x 201 (months of completed service) but shall not be more than 3/5 of the said salary. From 1 July 2015, the computation should be 1/360 of RM26,500 x 201 months = RM14,795.83 which is not more than 3/5 of the 26,500 salary.

[12] The plaintiff contends that the said retired judges and derivative pension holders referred to in para 4 above, whom the plaintiff represents suffer similar disadvantages and infringement of their rights as those suffered by the plaintiff.

[13] The particulars of the disadvantages suffered by the late Charles Ho Nyen Chung since 1 July 2015 amounting to RM269,603.04 are set out in para 5 and Table A of the affidavit of Christopher Ho Ming Ken ('encl 7') who is the executor of the estate of the Charles Ho Nyen Cheung, deceased.

[14] The computation and amount of derivative pension short paid to Catherine Lee, widow of the late Charles Ho Nyen Cheung from Nov 2020 to Feb 2022 amounting to RM54,686.86 is stated in para 2 of the affidavit of Catherine Lee ('encl 6').

[15] The computation and amount of derivative pension short paid to Ten Yaw Hee, widow of the late Chong Siew Fai (retired Chief Judge of the High Court of Sabah and Sarawak) for the period from July, 2015 to May, 2022 amounting to RM222,529.11 is set out in para 5 and Table 1 marked TYH1 of the affidavit of Ten Yaw Hee ('encl 26').The defendants did not dispute the computation and the amount of short paid pension in the affidavit of Christopher Ho Ming Ken, affidavit of Catherine Lee and the affidavit of Ten Yaw Hee.

CONTENTION OF THE PARTIES

[16] By way of summary, the plaintiff contends that the pension right of the plaintiff is protected by art 125(7) (read with art 125(9) of the Federal

Constitution [2] which states:

> 125(7) The remuneration and other terms of office (including pension rights) of a judge of the Federal Court shall not be altered to his disadvantage after his appointment.

(Article 125(7) was extended by art 125(9) to include High Court judges.)

[17] Article 125(9) of the Federal Constitution provides as follows:

> 125(9) This Article shall apply to a judge of the Court of Appeal and to a judge of a High Court as it applies to a judge of the Federal Court, except that the Yang diPertuan Agong before suspending under Clause (5) a judge of the Court of Appeal or a judge of a High Court other than the President of the Court of Appeal or the Chief Judge of a High Court shall consult the President of the Court of Appeal or the Chief Judge of that High Court instead of the Chief Justice of the Federal Court.

[18] Article 4(1) of the Federal Constitution provides:

> This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.

[19] The plaintiff contends that it is beyond argument that those words of art 125(7) are to borrow the words of Tindal CJ in the *Sussex Peerage Case* [1844] 11 Cl & Fin 85, 143) [31]–[32] 'precise and unambiguous' and 'no more can be necessary than to expound those words in their natural and ordinary sense'.

[20] The natural and ordinary sense of the word 'altered' is 'made different in some way' (https://www.merriam-webster.com) and that of the word 'disadvantage' is 'loss or damage especially in reputation, credit, or finances: detriment' (https://www.merriamwebster.com/dictionary/disadvantage).

VIOLATION OF ART 125(7) OF THE FEDERAL CONSTITUTION

[21] This leads to the question of whether the 'pension rights' of the plaintiff was 'altered' which the plaintiff contended above, have provided the affirmative answer by setting out the indisputable facts showing how the pension rights of the plaintiff were altered and continued to be so.

[22] The final question is whether the alteration was and still is to the plaintiff's 'disadvantage' after his appointment as a judicial commissioner on 1 March 1992 and as a judge on 20 August 1993 which again, the plaintiff contends can be answered in the affirmative for the reasons set out in Table 1 and Table 2 that are reproduced in the statement ('encl 3').

[23] The plaintiff contends that many of the points of law decided by the Court of Appeal in *Aminah bt Ahmad (suing in her personal capacity and on behalf of 56 retired members of the public services) v The Government of Malaysia & Anor* [2022] 4 MLJ 74; [2022] 1 LNS 24 can be applied to this case though that case concerns art 147(1) of the Federal Constitution which protects pensions granted to civil servants but which terms are in effect similar to the protection granted to judges under art 125(7) and which civil servants pension was similarly amended by the Pensions Adjustment (Amendment) Act 2013 with provision for an annual 2% increase based not on the current salary of a civil servant but on the salary fastened on 1 January 2012. The Court of Appeal held:

(a) the said amendments made by the Pensions Adjustment (Amendment) Act 2013 contravene art 147 of the Federal Constitution and are null and void as provided under art 4(1) of the Federal Constitution; and

(b) the situation prevailing before the amendment will be revived and continue to apply.

The Court of Appeal declined to make an order for retrospective adjustments to be made to pensions paid and for any shortfall to be paid because it was not proven that the actual loss was suffered.

[24] The plaintiff further contends that with regard to para 12 of the defendant's affidavit (No 1) ('encl 15'), the defendants by demanding the plaintiff and the judges return the 2% increase if they challenge the legality of Act A1462 had by that demand applied economic pressure on the plaintiffs and on the judges to give up their constitutional challenge on the legality of Act A1462 which threat is a violation of the independence of the Judiciary just as it was found to be so by the Canadian Supreme Court in the *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island; Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island R v Campbell; R v Ekmecic; R v Wickman Manitoba Provincial Judges Assn v Manitoba (Minister of Justice)* [1997] 3 SCR 3 Case, p 98, viz:

> 364. In addition to the claim based on the reduction of their salaries, the Provincial Court judges in Manitoba also contended that their independence was violated by the conduct of the executive in refusing to sign a joint recommendation to the Judicial Compensation Committee unless the judges agreed to forego their legal challenge of Bill 22. As already noted, the fact that the government and judges discuss remuneration issues is not necessarily unconstitutional. Nevertheless, in my view, the government's actions in this particular case constituted a violation of judicial independence.
>
> 365. The economic pressure placed on the judges was not intended to induce judges to favour the government's interests in litigation. Rather, it was designed to pressure them into conceding the constitutionality of the planned salary reduction. The judges, however, had bona fide concerns about the constitutionality of Bill 22. They

had a right, if not a duty, to defend the principle of independence in the superior courts. The financial security component of judicial independence must include protection of judges' ability to challenge legislation implicating their own independence free from the reasonable perception that the government might penalize them financially for doing so. In my view, the executive's decision not to sign the joint recommendation was made for an improper purpose and constituted arbitrary interference with the process by which judges' salaries were established: *Valente*, at p 704.

THE WAY FORWARD

[25] The plaintiff pointed out that there is nothing the plaintiffs or the judges can do if the defendants will not from now on after PU(A) 59 agree to any increase in the salary of the judges but that would cast doubt on the independence of the Judiciary.

[26] It was to overcome all these perceptions and problems which other countries also faced that they enacted laws to let an independent body decide on the salary of judges, like in Australia which passed the Remuneration Tribunal Act 1973 setting up an independent statutory authority to decide on the salary of, among others, judges after considering rival propositions.

[27] Since one of the conditions for judicial independence is financial security which requires that judicial remuneration should not be at the whims of the executive or legislature, the solution for Malaysia is simply to set up an independent remuneration tribunal for the purpose of resolving the judges' claim for salary increase instead of leaving it to the pleasure or whim of the Executive.

[28] In summary, the defendants' contends that:

(a) that pension adjustment is an 'additional benefit' which is not in the nature of a 'pension right' envisaged under art 125(7) Federal Constitution (para [4], [5] encl 15);

(b) the salary revision vide PU(A) 59/2016 is not intended to apply to judges who had retired before the coming into effect of the said salary revision on 1 July 2015 (para [6], [7] encl 15); and

(c) if pension adjustment is considered as a 'pension right', and Act A1462 is declared as null and void, the salary revision vide PU(A) 59/2016 which depends on the validity of Act A1462 should likewise be nullified (para [9]–[13] encl 15).

A EVALUATION AND FINDINGS

[29] The core issue in this case is whether adjustment of pension is within the ambit of pension rights and protected by art 125(7) of the Federal Constitution. If so, whether the constitutional rights (pension rights) of the plaintiff and those whom he represents have been altered to their disadvantage. As this issue involves the interpretation of art 125(7) read with art 125(9) and the related provisions of the Federal Constitution, this court is guided by the principles on interpreting a constitution enunciated in *Dato Menteri Othman bin Baginda & Anor v Dato Ombi Syed Alwi bin Syed Idrus* [1981] 1 MLJ 29 at p 32, by Raja Azlan Shah Ag LP (as His Royal Highness then was):

> In interpreting a constitution two points must be borne in mind. First, judicial precedent plays a lesser part than is normal in matters of ordinary statutory interpretation. Secondly, a constitution, being a living piece of legislation, its provisions must be construed broadly and not in a pedantic way — 'with less rigidity and more generosity than other Acts' (see *Minister of Home Affairs v Fisher* [1979] 3 All ER 21. A constitution is sui generis, calling for its own principles of interpretation, suitable to its character, but without necessarily accepting the ordinary rules and presumptions of statutory interpretation.

[30] In *CCH & Anor (on behalf of themselves and as litigation representatives of one CYM, a child) v Pendaftar Besar bagi Kelahiran dan Kematian, Malaysia* [2022] 1 MLJ 71, the Federal Court (per Tengku Maimun Tuan Mat CJ) held:

> [49] We believe that the answer to the question has been discussed an innumerable amount of times with the most recent being *CTEB*. The starting point is the understanding that fundamental rights and provisions must be construed as broadly as possible. Next, provisions which limit those rights must be construed as narrowly as possible. Finally, judicial precedent must play a lesser part when construing constitutional provisions. One cannot afford to be pedantic or cling helplessly to tabulated legalism.
>
> [50] When construing a word or words in the FC protective of or guaranteeing a fundamental right, the court should give their widest possible meaning without changing or warping the 'base' meaning. And when construing interrelated provisions, the court should read them as a whole having regard to the purpose and intent of those provisions and harmonise their collective meaning rather than put them at odds with another.

[31] For the purpose of considering the arguments of this case in their proper context, it is necessary to determine the reasons for and the significance of art 125(7) (read with art 125(9)) of the Federal Constitution ('the said articles'). This is because they have to do with the independence of the Judiciary.

[32] In that regard, Professor Martin Friedland in his report to the Canadian Judicial Court (May 1995, 432) said: A

> There is, of course, a close connection between judicial salaries and judicial independence … if a judge's salary is dependent on the whim of the government, the judge will not have the independence we desire in our judiciary. If salaries could be arbitrarily raised or lowered in individual cases, or even collectively, the government would have a strong measure of control over the judiciary (p 53). B
>
> We should be concerned not only about the process of establishing pay, but also about the level of pay (p 53).
>
> We do not want judges put in a position of temptation, hoping to get some possible financial advantage if they favour one side or the other (p 53). C
>
> A very important reason for good judicial salaries is, of course, to enable the recruitment of excellent candidates to the bench (p 54).
>
> … within limits, the greater the financial security, the more independent the judge will be, and so, in my view, it is a wise investment for society to err on the more generous side (p 56). D

[33] The basic principles on the independence of the judiciary endorsed by the United Nations General Assembly Resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985 states, inter alia, as follows: E

> 1. The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.
>
> 2. The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason. F
>
> …
>
> 1. The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected. G
>
> …
>
> 11. The term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law. H

[34] The remuneration and pension benefits of a judge was governed by the Judges' Remuneration Act 1971 (Act 45) before its amendment in 1984 by the Judges' Remuneration (Amendment) Act 1984 (Act A609). One of the provisions that was subsequently amended was the computation of the pension to be based on the actual last drawn salary. I

[35] In 1984, Act A609 was passed with retrospective effect from 1 July 1980 and introduced for the first time, inter alia, the Third Schedule and the Fourth Schedules which stood for more than three decades before they were removed in 2014 by the Judges' Remuneration (Amendment) Act (A1462). Act A1462 was *gazetted* on 12 June 2014 with the relevant sections applied retrospectively to 1 January 2014. Under Act A609, a new provision was introduced in that instead of the actual last drawn salary for the computation of the pension, it is to be based on the current salary of a serving judge.

[36] The table below show the judges salaries for the relevant years and pension were adjusted upward. The Chief Justices of that period had no problem in getting the necessary regulations approved by the then Prime Ministers in those regular upward revision of the salary in between short intervals.

Year	Judges' salary	Pensions received by Ian Chin Hon Chong	Pension monthly increment
2000	9,500.00	5,304.16	
2002	10,950.00	6,113.75	809.59
2004	12,045.55	6,725.43	611.68
2007	13,054.97	7,289.02	563.59
2009	17,754.76	9,913.07	2,624.05
Till July 2015		No increase	

[37] In 2009, the Judicial Appointments Commission Act 2009 (Act 695) came into force and the Judicial Appointments Commission ('JAC') was established. Act 695 applies to the appointments of judicial commissioners and to appointment of judges to the High Court, the Court of Appeal and the Federal Court. By s 2, the Prime Minister is given the mandate to uphold the continued independence of the judiciary and must have regard to:

(a) the need to defend that independence;

(b) the need for the judiciary to have the support necessary to enable them to exercise their functions; and

(c) the need for public interest to be properly represented in regard to matters relating to the judiciary, the administration of justice and related matters.

[38] In 2013, the public servants pension scheme was altered by the passing of the Pensions Adjustment (Amendment) Act 2013 (Act A1447) which came into effect on 1 January 2013 after receiving the Royal Assent on 27 December

2012. Under Act A1447, a pension of 2% annual increment was payable instead of a formula based on the salary of a serving public servant under the old scheme.

[39] In 2013 too, the bill for the Act A1462 was tabled in Parliament and had its third reading. It sought to amend the law governing the pension of the judges in the same manner as it had dealt with the pension of the public servants.

[40] On 18 July 2013, the JAC was given a briefing ('taklimat') by Yeow Chin Keong of Public Services Department regarding the said 2% increase in pension for public servant.

[41] On 23 October 2013, it was recorded that the JAC meeting took notice ('mengambil maklum') of the bill for Act A1462 which Act later received the Royal Assent on 9 June 2014 and was *gazetted* on 12 June 2014.

[42] On 4 December 2014, the Chief Justice wrote to the Prime Minister for salary increase for the judges forwarding a lengthy paper prepared by the JAC to justify the request for the salary increase.

[43] It was not till 9 March 2016, some six years after the last revision in 2009 that the Prime Minister put his signature to the Judges' Remuneration (Amendment of First and Fifth Schedules) Regulations 2016 to enable the increase in the judges' salary to RM26,500 with retrospective effect from 1 July 2015.

[44] From thence, the pension increment was at a flat rate of 2% instead of under the formula of the said Third and Fourth Schedule which Act A1462 removed.

[45] The defendants after, inter alia, stating (encl 39, para 7) that there is 'zero contribution' from pensioners quoted the following passage from the judgment Raja Azlan Shah in *Raja Mohktar bin Raja Yaacob v Public Trustee, Malaysia* [1970] 2 MLJ 151, 153:

> ... pension rights are *ex gratia* payments made to a government servant in respect of his past conduct and service out of the discretion of the Government and independent of the existence of any right of redress given to him against others.

[46] That case dealt with the assessment of damages for personal injury and one of the issues was whether service pension was to be considered and the court decided it should not for the reason given in that passage.

[47] If we refer to *Haji Wan Othman & Ors v Government of the Federation of Malaya* [1965] 2 MLJ 31; [1965] 1 LNS 51 which dealt directly with the right to pension for public servant, we will gather why such pension can be described in those words of Raja Azlan Shah. Suffian J when dealing with ss 3, 5 and 11 of the Pensions Ordinance 1951 said:

> ... the whole tenor of the legislation being permissive, the relevant authority being merely authorised, not compelled, by the legislature to do this and that for the retired officer ... Should there be any doubt about this, s 5 of the Ordinance in the most emphatic terms provides:
>
> (1) No officer shall have an absolute right to compensation for past services or to any pension, gratuity or other allowance under this Ordinance nor shall anything in this Ordinance contained limit the right of the Federal Government or, as the case may be, of the Government of any State to dismiss any officer without compensation.
>
> (2) Where it is established to the satisfaction of the Yang di-Pertuan Agong that an officer has been guilty of negligence, irregularity, or misconduct, it shall be lawful for the Yang di-Pertuan Agong reduce or altogether to withhold the pension, gratuity or other allowance for which such officer could have become eligible but for the provision of this section.

[48] A similar provision was made in s 3 of the Pensions Act 1980 which replaced the Pensions Ordinance 1951 with a section title added, viz: Pension, etc, not an absolute right.

[49] Therefore, in so far as public servants, which at that time include judges, are concerned they are governed by the Pension Ordinance 1951. Their pension rights are ex gratia payment at the discretion of the Government. It was not till 3 September 1971 when the Judges' Remuneration Act 1971 (Act 45) came into force to deal exclusively with the salaries, allowances and pension of judges and all 'ties' with the various Pension Ordinance of Malaya, Sabah and Sarawak were removed by s 14 in these words:

> 14(1) Section 2 of the Pension Ordinance 1951, as applicable to the States of Malaya, is hereby amended by deleting the words 'a Judge of the Supreme Court and' from the definition 'officer' therein.
>
> (2) Subject to sections 12 and 16, so much of the provisions of the Pensions Ordinance 1951 aforesaid, the Pensions Ordinance 1963, of Sabah and the Pensions Ordinance of Sarawak as may be applicable to a Judge of the Federal Court or of the High Court of Malaya and Borneo and so much of the provisions of any notification made under section 2 respectively of the aforesaid pension laws respecting the office of a Judge shall upon the commencement of this Act be deemed to have no force or effect.

[50] From thence, Act 45 governed judges which emphatically states a retiring judge is entitled to a pension and other benefit and s 3 bears that out:

3 Pensions and other benefits of a Judge

A Judge shall on his retirement be entitled to a pension and other benefits in accordance with this Act.

[51] The term is different from the Pension Act 1980 which topical heading of its s 3 reads: 'Pension, etc, not an absolute right'.

[52] Therefore, the reliance on the said cases concerning the public servants to contend that the judges do not have a vested right in the pension is misplaced. The judges do have that right under the said s 3 of Act 45 and it is protected by art 125(7).

[53] The defendants had in their affidavit (encl 27, para 7.3) asserted that Act A609 introduced new provisions to allow for pension adjustment and that 'it was stated that pension adjustment being 'additional benefit' which 'can be subject to the imposition of conditions', quoting from the explanatory note to the Bill. Those words are used as justifying Act A1462 because, the defendants contend, Act A1462 introduced a new mechanism for pension adjustment. To which the plaintiffs had replied by their affidavit (encl 28, para 6) that Act 609 introduced new beneficial provisions for pension adjustment with the condition that for the judges to enjoy the new provisions they must be resident in Malaysia. There was no new beneficial provisions introduced by Act A1462. As shown in Table 1 above, Act A1462 have the effect of disadvantageous alteration of the pension rights and benefits by substituting the existing formula for calculating the pension payable with a new one causing the plaintiffs to receive a monthly increment of, taking the month of July 2015 as an example, only RM202.23 instead of an otherwise RM4,482.28.

[54] The defendants further contend that pension adjustment is only an additional benefit which is not protected by art 125(7) for the following reasons:

(a) because 'the concept of pension adjustment was only intended to a form of 'kebajikan', 'faedah tambahan' 'penghargaan ke atas jasa-jasa terhadap negara';

(b) the genesis of pension adjustment was a form of assistance for the lower income group of the public officers but subject to the financial ability of the government and the broader economic performance of the country;

(c) since pension adjustment is contingent upon those factors and a change in the salary scheme, it cannot be considered a vested right and this is borne out by (Act A1447) which amended the method of pension adjustment to provide for an automatic yearly pension adjustment after

quoting from the notes of debate concerning the Pensions Adjustment Act 1980 (Act 238); and

(d) the defendants contend (encl 39, para 13) that show a link of history between judges and public servants concerning pension adjustment with a 'semblance of uniformity of policy'.

[55] This court inclined to agree with the plaintiff's submission that whatever said during the debates concerning the pension legislation has no bearing and no relevance when considering the issues at hand which is whether Act A1462 disadvantageously altered the pension rights when the Government changed the law in 2013. It bears reminding the words of art 125(7) which are:

> (7) The remuneration and other terms of office (including pension rights) of a judge of the Federal Court shall not be altered to his disadvantageous after his appointment.

[56] The remuneration, terms of office and pension rights are set out explicitly in Act 45 including the pension benefits set out in the Third and the Fourth Schedule which a judge is entitled on his retirement (see s 3 of Act 45 above). Equally important is the provision in s 4 which says a judge is entitled to 'any adjustment of pension to his advantage that may be made in accordance with Part IIIA' where s 15B provides:

> 15B Adjustment of pension and other benefits of Judges and dependents
>
> (1) Subject to Part III and this Part, pensions and other benefits granted to Judges and their dependents under that Part before or on the implementation of any current salary shall be adjusted in accordance with this Act and shall be paid or payable with effect from the date of implementation of the current salary.
>
> (2) The pension of a Judge granted under Part III shall be adjusted as provided in the Third Schedule.
>
> (3) Any derivative pension granted under Part III shall be adjusted as provided in the Fourth Schedule.
>
> (4) Any disability pension or dependent's pension granted under Part III shall be adjusted based on the Judge's corresponding last drawn salary but the factor applicable shall be the factor under that Part.

[57] It is thus clear from the tenor of those terms, that pension adjustment must be done in accordance with the Third and Fourth Schedule when there is an upward revision of the salary of a judge. This is part of the 'pension rights' which art 125(7) speaks of and protects.

[58] Therefore, this court finds no merit in the contention of the defendants that because 'pension adjustment is a form of additional benefit' it is 'not a

vested right' when Act 609 was introduced and not protected by art 125(7) which the defendants contend is supported by debate note for Act A609 (encl 39, para 15). Once Act 609 was passed it confers on the judges all the benefits including pension rights stated therein and it triggers in the protection of art 125(7). Thereafter, the Government must not do anything that results in the disadvantageous alteration of those rights which the Government did. The Government passed Act A1462 discarding the formula of the Third and Fourth Schedule and instead introduce a new formula of a flat rate of 2% annual pension increment which the Government argued is better. The defendant have not shown how can, as said earlier, RM202.23 be better than RM4,482.28 and how that does not amount to a disadvantageous alteration. Further, the Debate Notes have no place in the interpretation of Act 609 which relevant provisions referred to earlier are clear and unambiguous. In any event there is nothing in the said debate notes which say 'pension adjustment is a form of additional benefit' and it is 'not a vested right'.

[59] If the figure of RM4,482.28 looks colossal, it is because there was no salary increase for about six years instead of the regular interval of about two years done before 2009. When the salary was in 2015 increased to RM26,500 from that of RM17,754.76 in 2009, an increase of RM8,745.24, it can be surmised that the salary increase was to cover the lost six years. If instead of increasing the salary at one go in 2015, but spread out yearly from 2010 to 2015, this would have been the result:

Year (Actual salary in 2009 — 17,754.76)	Suggested salary increase over the years	Consequential pension Increase	Pension increase
2010	18,754.76	10,471.40	558.33
2011	19,754.76	11,029.74	558.34
2012	20,754.76	11,588.07	558.33
2013	21,754.76	12,146.40	558.33
2014	23,754.76	13,263.07	1,179.67
2015	26,500.00	14,795.83	1,532.76

[60] Thus, if the salary increase was done in the orderly manner illustrated in that table, the pension increase would not look so huge as the claim suggests.

[61] The plaintiff contends that in 2013, the Government had put before Parliament the Bill for Act A1462 which they contend they could because they have already done so with regards to public servants under Act A1447 on the 'parity principle' and on the ground 'A1462' brought new benefit.

(a) the defendants contend they are entitled relying on the principle of parity to reduce the pensions payable to retired judges because they have already done so to the civil servants so as, according to the defendants, to be fair to both.

(b) the parity principle is usually applied in criminal justice where it is said in *Green v The Queen* [2011] HCA 49, para 28:

> Equal justice and the parity principle
>
> 'Equal justice' embodies the norm expressed in the term 'equality before the law'. It is an aspect of the rule of law. It was characterised by Kelsen as 'the principle of legality, of lawfulness, which is immanent in every legal order.' It has been called 'the starting point of all other liberties'. It applies to the interpretation of statutes and thereby to the exercise of statutory powers. It requires, so far as the law permits, that like cases be treated alike. Equal justice according to the law also requires, where the law permits, differential treatment of persons according to differences between them relevant to the scope, purpose and subject matter of the law. As Gaudron, Gummov and Hsyne JJ said in *Wong v The Queen*:
>
> > Equal justice requires identity of outcome in cases that are relevantly identical. It requires different outcomes in cases that are different in some relevant respect.
>
> Consistency in the punishment of offences against the criminal law is 'a reflection of the notion of equal justice' and 'is a fundamental element in any rational and fair system of criminal justice'. It finds expression in the 'parity principle' which requires that like offenders should be treated in like manner. As with the norm of 'equal justice', which is its foundation, the parity principle allows for different sentences to be imposed upon like offenders to reflect the different degrees of culpability and/or different circumstances.

(c) thus, at the very least, in order to justify the action of altering both the pension benefit of the civil servants and of the retired judges on the parity principle, it must first be established whether such alteration is lawful. The Court of Appeal (*Aminah bt Ahmad*'s case) found that to be unlawful. Similarly, it is unlawful in the present case. Thus, the defendants fail to clear the first hurdle for the application of the parity principle, assuming for the moment it is applicable to the present case which the plaintiffs say it is not, which is that whatever the defendants do or plan to do must be lawful; and

(d) in any case, the parity principle is invoked in criminal justice where like offenders should be treated alike and has no application to the present case because the retired judges and the civil servants are not offenders to justify being meted out those treatments of slashing their pension benefits.

[62] By using the parity principle to justify the new formula for the pension adjustment of judges at the rate of 2% annually to be in line with the civil servants, the defendants had failed to appreciate the significant differences in the salary structure, status and role played by judges. The salary of the Chief Justice, President of the Court of Appeal, Chief Judges and Federal Court and Court of Appeal judges and High Court judges is based on a single point salary without any annual increment or bonus as enjoyed by employees in the civil service or the private sector. See para 2 of the Chief Justice's Policy Paper for the Prime Minister's Consideration of the Proposal to Amend the Judges Remuneration Act 1971 marked as MSA1 of encl 27. The role and status of judges is aptly described in the Chief Justice's Policy Paper as follows:

> 5. The Role of Judges
>
> 5.1 In a democracy such as ours, where the Constitution is supreme, judges play a very vital role. Judges are the guardians of the Constitution and the upholder of the Rule of Law. It has been said by none other than His Royal Highness Sultan Azlan Shah himself in a speech in 1986, that 'it is axiomatic that judges in all legal systems occupy a special status. This status is bestowed on them mainly because of the position they hold.
>
> ...
>
> 9.3 Thus being acutely conscious of these debilitating diaspora, Malaysia currently imposes one of the shortest time frames for the disposal of cases in the common law world. Adherence to the exacting timelines can only be achieved by judges in the long hours of work, both in and outside of Court. The writing of judgments is routinely conducted outside the office and at home. In short, judging is not a job but is a vocation for life. In fact there are no clear and distinct working hours after which a judge can state that he has completed his work. It is a continuous process of thought and evaluation. Judges are therefore acutely conscious of the fact that the public look to them for matters affecting their civil and legal rights or their liberties and welfare as well as law and order. Judgements often determine the rights of this generation and the next.

[63] Not only are judges required to uphold the rule of law and to do justice and ascertain rights in accordance with the evidence and the law, the judiciary plays an essential constitutional role in providing effective checks and balances on the executive and legislature. Hence, it is unfair and inconsistent with art 125(7) to alter the pension rights of judges or retired judges to their disadvantage by applying the parity principle. As discussed above, the parity principle is usually invoked in determining the punishment of offenders or wrongdoers. Further, the number of pension recipients from the civil service (over 800,000) far outnumber retired judges (152). See paras 9 and 11 of defendant's affidavit (No 1) (encl 15).

[64] The defendants tried to rein in the JAC when they alleged, they had twice consulted the JAC over the Act A1462 and met with no objection from

them producing part of the minutes of the meeting held by the JAC. As stated earlier, there was no consultation, just briefing and taking notice of what was happening. The defendants contend since the minutes do not say the JAC had not objected it can be concluded they have agreed. The minutes is a written record of what was said at the meeting. Therefore, if the minutes do not record or state that the JAC or any of its member had expressed any view concerning Act A1462, it means they have not expressed any view. It is incorrect to infer or presume that such absence mean they have agreed to Act A1462 which this court finds to be without merit. In any event, it is undisputed that the plaintiff and those whom he represents were not briefed and did not agree to Act A1462. It is against the principles of fairness and natural justice when judges who have served the people and country in the administration of justice and sacrificed quality time and comfort with long hours of work to uphold the rule of law are not accorded a right to be heard after their retirement on a significant matter involving the alteration of their constitutional rights to pension adjustment by Act A1462 to a disadvantageous and less favourable rate of increment. In *Maria Chin Abdullah v Ketua Pengarah Imigresen & Anor* [2021] 1 MLJ 750, the Federal Court (per Nallini Pathmanathan FCJ) held:

> [192] Put another way, where the civil rights of an individual are affected by an administrative action, natural justice ought to be complied with.
>
> ...
>
> [194] ... Therefore, the exercise of a statutory power by the Legislature or Executive seeking to remove or curtail a fundamental right, requires the principles of natural justice to be complied with. Any attempt to exclude the right to be heard statutorily is void.

[65] As regards PU(A) 59/2016, it was made pursuant to s 19 of the Act 45 which reads:

> Regulations 19
>
> (1) The Yang di-Pertuan Agong may, after consultation with the Chief Justice, make regulations for the purpose of carrying into effect any of the provisions of this Act.
>
> (2) Regulations made under subsection (1) may amend or vary the First, Second and Fifth Schedules.

[66] That regulations expressly enable the amendment of the salary of a judge under the First Schedule and that was done. Thus, when the Chief Justice in 2014 wrote to the Prime Minister for the increase of the judges' salary accompanied by the policy paper prepared by the JAC, he was only dealing with the salary of judges. The law did not empower him nor the JAC to deal with the question of pension. Hence, no mention whatsoever was made of the question of pension. PU(A)59/2016 was a standalone regulation made under the said s 19(2).

[67] The defendants contended (encl 39, para 22) the 'Chief Justice had reassured that the proposed salary revision was only intended for serving judges. It is undisputed that salary is for serving judges while pension is for retired judges. The Chief Justice does not deal and has no power to deal with the pensions payable which is dealt with under s 15B(1) of Act 45 and which stipulates for the adjusted pension to be paid upon and from the date of the implementation of any current salary.

[68] As alluded earlier, the salary revision regulation PU(A) 59/2016 is not dependent on the validity or otherwise of Act A1462. It is a standalone regulation. Furthermore, PU(A) 59/2016 provides for an increase in the salary of judges which had been stagnant for six years and the increase is to their advantage. As there is no disadvantageous alteration to the salary of Judges by PU(A) 59/2016, this court finds that the said PU(A) 59/2016 is not inconsistent with art 125(7) of the Federal Constitution and is lawful and valid. Thus, the defendant's contention that in the event that Act A1462 is nullified, then PU(A) 59/2016 should also be nullified and the consequential prayer by the defendants for reversion to the pre PU(A) 59/2016 salary is without merit.

[69] As for the alleged financial constraint, from a legal stand point, it is immaterial that because there are 152 recipients of the pension that the increase pension claim would result in the payment of an additional RM16,652,301.96pa because that is what the plaintiffs are entitled to under the law before the defendants removed them. The sums could be paid out of the consolidated fund and/or the contingency fund.

[70] The defendants further contends that the pension increase claim by retired judges would have an indirect impact on retired civil servants who also receive an annual pension increase of 2%. The short answer to this contention is that the earlier decision of the Court of Appeal in *Aminah*'s case cited above has a direct impact on the 2% pension increase for retired civil servants. It is evident that the outcome of the civil servant's claim for pension increase has been determined by the court of Appeal and does not depend on the findings in the retired judges' claim by this court. As alluded above, the number of retired judges recipients (152) is far lesser than the retired civil servant recipients (over 800,000).

[71] As regards the defendants' prayer for the various consequential orders including the reversion to the previous salary and the return of salary or the 2% annual pension increase paid since July, 2015, this court finds that it is without merit for the reasons stated in para [68] above and makes no order for such return or refund. The new formula turned out to be far lesser than the rate of increment under the old formula. It is undisputed that the prices of essential

goods and services had increased tremendously since 2015. Thus, there is no evidence of unjust enrichment or gain at the defendants' expense on the part of the plaintiff and those whom he represents to warrant an order for refund or restitution. See *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2015] 2 MLJ 441; [2015] 2 CLJ 453 (FC).

CONCLUSION

[72] In the final analysis, the undisputed facts set out in paras 9–15 above shows that the pension rights of the plaintiff and those whom he represents have been altered to their disadvantage by Act A1462. The disadvantage is not negligible but very substantial as shown in Table 1 which is reproduced in para 9 above. The facts, computation and figures stated in Table 1 are undisputed. The automatic right to an adjustment under the repealed law is replaced with a fixed annual adjustment of 2% and any further adjustment to address the unfavourable rate of increment is at the pleasure of the Yang di-Pertuan Agung. To date, no adjustment was made by the King to address the unfavourable increment rate.

[73] Applying a broad interpretation of art 125(7) read with art 125(9) of the Federal Constitution as enunciated by the Appellate Courts in *Dato Menteri Othman*, *CCM* and *Aminah* above to the present case, this court finds that pension adjustment is an integral part of pension rights which is protected under art 125(7) read with art 125(9) of the Federal Constitution. The less favourable situation and disadvantageous alteration created by Act A1462 is inconsistent with the pension rights of the plaintiff and those whom he represents as enshrined in said articles. In the premises and to the extent of the inconsistency, Act A1462 is void for being inconsistent with art 125(7) read with art 125(9) of the Federal Constitution.

[74] The plaintiff and the estate of the named affected judges represented by him (the late Charles Ho Nyen Cheung and the late Chong Siew Fai) have adduced unchallenged evidence in para 6 and Table 1 marked TC(1) of encl 2, para 5 of encl 7, para 3 of encl 6 and para 11 and Table 1 (TYH1) of encl 26 to prove that they have suffered loss due to the disadvantageous alteration of their pension or derivative pension rights. The computation and amount of the short fall from the pensions or derivative pensions paid to the named judges or their widows or executor which are asserted in the aforementioned affidavits are undisputed by the defendants. Hence, the plaintiff and the estate of the named affected judges have proven that they have suffered loss and damages in consequence of the disadvantageous alteration on a balance of probabilities. In the premises, the court has power to mould the remedy or relief to suit the justice of the case. See *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145; [1997] 1 CLJ 147 (FC) and *Aminah bt Ahmad (suing*

in her personal capacity and on behalf of 56 retired members of the public services) v The Government of Malaysia & Anor [2022] 4 MLJ 74; [2022] 1 LNS 24 (CA).

[75] Based on the aforesaid reasons, encl 1 is allowed in terms of prayers A, B and C and also under prayer F of encl 1:

(a) an order in terms of para 5(a) of the affidavit of Christopher Ho Ming Ken affirmed on 22nd day of February 2022 (encl 7);

(b) an order in terms of para 3(a) of the affidavit of Catherine Lee affirmed on 22nd day of February 2022 (encl 6); and

(c) an order in terms of para 11 and Table 1 ('TYH1') of the affidavit of Ten Yaw Hee affirmed on 10 May 2022 (encl 26).

[76] In the interest of justice, the 2% annual pension increase received by the plaintiff, the late Charles Ho Nyen Cheung and the late Chong Siew Fai or their widows or executor since July, 2015 shall be deducted from the amounts awarded in para 75 above.

[77] Except for the corresponding amounts and figures, the unnamed affected Judges represented by the plaintiff would also suffer disadvantage, loss and damage similar to the plaintiff and the named affected judges by reason of the new formula. As illustrated above, it is undisputed that the amount of pension increase under the new formula of 2% only amounted to a small fraction of the amount of pension increase if made under the old formula. Therefore, the issue of refund of the 2% paid under the new formula does not arise. Save that the 2% annual pension increase shall be deducted from any short fall of pensions, in the interest of justice, this court makes no order for refund of the pension or derivative pension or the 2% paid from July, 2015 onwards.

[78] Hence, the unnamed judges whom the plaintiff represents are entitled to the same adjustment to their pension or derivative pension from July, 2015 onwards based on the old formula and the amount of any short fall in the pensions or derivative pensions after deducting the 2% received by them or those who are receiving their derivative pensions on account of the death of such judges shall be paid to such unnamed judges or their widows or dependents or legal representatives.

[79] The amounts awarded to the plaintiff and those whom he represents shall carry interest at the rate of 5%pa from the date of this judgment until the date of full and final settlement.

[80] As indicated above, the instant case involves the affected judges (named or unnamed) represented by the plaintiff who retired long ago and some of whom are deceased. Thus, there shall be liberty to apply for consequential orders in order to work out and give effect to this judgment, where necessary.

[81] As this case not only involves the plaintiff's rights but also concern a matter of public interest, this court makes no order as to costs.

Enclosure 1 allowed.

Reported by Nabilah Syahida Abdullah Salleh